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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1158

WILLARD H. FLEMING,

Petitioner,

vs.

THE STATE PERSONNEL BOARD, and GEORGE HOPFENBECK, LAIRD CAMPBELL, FRED VIERRA, DOROTHY A. MCRAE, and JACK DE VIVIER, Board Members

Respondents

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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Petitioner, pursuant to the rules of this court, respectfully submits his reply to the Response to the Petition for Writ of Certiorari herein.

Reasons for Granting the Writ

A. Petitioner's right to reinstatement ultimately depends upon service "... in time of war or other emergency declared by proper authority of the state or the United States. ..." C.R.S. 1963, 94-1-35.

The question of existence of emergency may only be determined by the executive branch of government. There is nothing anywhere in the Proclamation declaring the emergency which suggests that it is in "official" or "technical",

but not "actual" existence. Similarly, the statute contains no such reference or limitation. There have been periods of armed intervention subsequent to 1955 when Korean combat activities were ended, notably Viet Nam and Southeast Asia. The effect of the decision below is to declare that no emergency actually existed during that time of Petitioner's military service. This the Colorado Court is not competent to do.

The Colorado Supreme Court has no power to rob the Presidential Proclamation of effect. It has decided a substantial federal question in a manner not in accord with any of the federal decisions of which Petitioner is aware.

B. It is submitted that the rights of persons to employment are of substance, and that the Colorado Supreme Court's misjudgment of the question presented here deprives Petitioner of very substantial rights and benefits. Respondents' claim that this case can only be of "isolated significance" is refuted by the case they cite — *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L.Ed. 897 (1955), where subsequent to granting the writ of certiorari, the Iowa legislature passed a statute which "... statute bars the ultimate question presented in this case from again arising in that State." While it may not be possible to accurately predict how many persons are similarly situated, or how many could be affected by the decision, it is clear that the state of national emergency still eixsts, and that persons still serve in the armed forces.

C. Respondents' apparent position that the individual state courts have the power to go beyond the Presidential declaration of existence of emergency is not supported by the law, as clearly appears from the cases cited in the Petition herein. The declaration of a state of national emergency is a

matter for the President, and only the President, under the United States Constitution, Article II, Sections One and Two.

Conclusion

Wherefore, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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